

IN THE MATTER OF THE ARBITRATION BETWEEN:

PORT GROUP HOMES
and
SEIU HEALTHCARE MINNESOTA Local 113
FMCS Case No. 16-50218-8

OPINION AND AWARD OF ARBITRATOR

Richard A. Beens
Arbitrator
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APPEARANCES:

For the Employer:

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For the Union:

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Date of Award: September 27, 2016

JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement ("CBA") Port Group Homes ("Port" or "Employer") and SEIU Healthcare Minnesota Local 113 ("Union").¹ Ronee Wronna ("Grievant") was employed by Port and a member of the Union.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render a binding arbitration award. The hearing was held on September 20, 2016 in Brainerd, Minnesota. Both parties were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Oral closing arguments were given at the end of the hearing. The record was then closed and the matter deemed submitted.

ISSUES

Formulation of the issues was left to the arbitrator. I find them to be:

1. *Is the matter properly before the arbitrator where the Union failed to file a timely written demand for arbitration?*
2. *Did the Employer have just cause to terminate Grievant and, if so, what is the appropriate remedy?*

¹ Employer Exhibit 1.

FACTUAL BACKGROUND

The Employer is a group home for at-risk youth that was organized as a U.S.C. §501 C (3) non-profit in 1972. It is licensed by the Minnesota Department of Corrections pursuant to Minnesota Administrative Rules, Chapter 2960. With a capacity for 16 boys and 14 girls, Port's residents customarily range from 12 to 17 years old. The youth arrive at Port from a variety of sources, by court order, placement from county child protection units, and voluntary parental admission. The youth typically suffer from previous violence, abuse, mental health issues, or other trauma. Many of them have a history of violence, acting out, and distrusting authority. Often the Employer serves as a way-station for a youth's subsequent adoption or placement in foster care. Some are there for a court ordered 30 day assessment which occasionally extends into a four to six month treatment program.

Grievant was one of 32 Port employees. These include, among others, two teachers, Primary Counsellors, and Youth Counsellors. Residents spend a half day with each of the teachers. Primary Counsellors handle resident counseling, develop and monitor treatment plans, and act as the principal interface between residents and external parties (e.g. parents, police, courts, child protection agencies, etc.) As a Youth

Counsellor, Grievant was responsible for guiding and monitoring the day to day activities for the children she supervised. It was her overall duty to maintain a safe environment and ensure the residents' basic rights as required by Minnesota Rule §2960.0050 and Port's policies are honored.² Rights principally applicable to this grievance are a resident's right to privacy³ and respect.⁴

This case arises from Grievant's interactions with a 13 year old female resident ("FR").⁵ Sometime in late 2014 or early 2015, one of the Port teachers privately expressed a desire in either serving as a foster parent or adopting FR. Initially, it appears only Kirsten McKee, the Port Girls Program Director, and Heather Kelm, the Port Executive Director were aware of and involved in processing the teacher's request. When informed of the teacher's interest FR had two reactions, first, ambivalence and, second, fear that other residents would react with hostility upon learning of the teacher's apparent favoritism. For both of the above reasons, she specifically asked that the process be kept completely confidential.

² Employer Exhibit 2.

³ Ibid.

⁴ Employer Exhibit 3.

⁵ For reasons of privacy, the child involved will only be referred to as "FR" (female resident).

Nevertheless, in early February, 2015, McKee learned that another Youth Counsellor, Sunny, had learned of teacher's interest in adopting or serving as a foster parent for FR. In response, McKee immediately called a meeting of all staff on February 3, 2015. Grievant attended the meeting. Without disclosing any details, the staff was told that FR was the subject of an ongoing, highly confidential process. Further, they were informed that FR should not be questioned about it nor should the staff discuss or share any confidential information with others.

Immediately after the meeting, Grievant followed McKee to her office and pressed for further information about FR. McKee declined and directed Grievant to drop the subject of FR and, further, if approached by FR, she was told not to engage or promote any such conversation. Grievant responded, "*..you are very good at staying confidential.*"⁶

A little over five weeks later, on Monday March 16, 2015 Grievant reported to her supervisor that FR had written a letter informing her of the possible adoption. When McKee asked to see the letter Grievant indicated she had read it and then shredded it at FR's request. Concerned about the possible breach of confidentiality, McKee and Primary Counsellor Allison Quincer

⁶ Employer Exhibit 11.

met with FR the following day. FR indicated she felt pressured into writing the letter to Grievant. On March 18, 2015 FR was interviewed a second time in a Case Management session by McKee and the Port Girls Group Home Primary Counsellor, Nicholas Pederson. The latter reported an apparent verbatim transcript of a portion of the interview:⁷

Kirsten: "Does anyone else know about your potential foster family?"

FR: "Ronee knows"

Kirsten: "How does she know?"

FR: "Well, she kept asking me about what was wrong and kept on asking me about [a prior foster mother]⁸. She (Ronee) knew that there was a little more to it and that she knew a little more about what was going on but did not know all of it. She (Ronee) said if Sunny (Port staff) knew about it, that it wasn't fair and she should know too."

Kirsten: "So you told her?"

FR: "I told her, well I didn't tell her. I wrote her a letter and told her to shred it afterwards."

⁷ Union Exhibit 2.

⁸ Name omitted for privacy purposes.

McKee and Helm held an investigative meeting with Grievant on March 18, 2015. Grievant denied asking FR for information. In addition, she maintained that she didn't know of the need for confidentiality until March 4, 2015 - despite having attended the February staff meeting and subsequently pressing McKee for more information about FR. Last, McKee and Helm found Grievant's, "... explanation of events was inconsistent and included backtracking on many details including where and when certain conversations took place."⁹

Grievant was terminated following the March 18, 2015 investigative meeting. The Employer cited Standard Operating Procedures, chapter 10.4, Resident Rights - A reasonable right to privacy and a violation of Ethical Standards 9.3,¹⁰ Respect for Residents, as the basis for the termination.¹¹

The Union filed the present grievance the following day, March 19, 2015.¹² During a Step 3 grievance conference, Grievant acknowledged telling FR, "*If Sunny knows, then why can't I know.*"¹³ The grievance hearing was held on April 7, 2015. The Employer denied the Step 3 appeal in a letter to the Union on

⁹ Employer Exhibit 10.

¹⁰ Although cited as Ethical Standard 9.3 in the termination letter, the provision actually appears as 8.6 in Employer Exhibit 3, Port Group Home Ethical Standards.

¹¹ Employer Exhibit 11.

¹² Employer Exhibit 12.

¹³ Employer Exhibit 13.

April 22, 2015.¹⁴ In an email exchange with the Union on the following day, Helm stated, "*PORT Group Homes would like to waive the non-binding mediation procedure and move directly to step 5.*"¹⁵ The Union never filed a written demand for arbitration as required by CBA Article VIII, Sec. 8.1.¹⁶ No attempt to pick an arbitrator was made until almost a year later. It was initiated by the Union on April 11, 2016.¹⁷ I was notified of my selection as arbitrator via email from the Union on April 29, 2016.

APPLICABLE CONTRACT, RULE AND POLICY PROVISIONS

Collective Bargaining Agreement

Article V - Termination of Employment

Employees shall not be discharged or disciplined except for just cause...

Article VIII - Grievance and Arbitration

Section 8.2 - Procedure. *Any dispute by an employee or the Union relating to the interpretation of or adherence to the terms and provisions of the Agreement shall be handled as follows:*

Step 5: *If the grievance is not resolved in Step 3 (or Step 4 if utilized), the Union may refer the matter to arbitration. Any demand for arbitration shall be in writing and must be received by the Employer within fourteen (14) calendar days following the Step 3 meeting...*

¹⁴ Ibid.

¹⁵ Employer Exhibit 15.

¹⁶ Employer Exhibit 1, p. 8.

¹⁷ Employer Exhibit 15.

MINNESOTA ADMINISTRATIVE RULE 2960.0050

Resident Rights and Basic Services

Subpart 1. **Basic Rights.** A resident has basic rights including, but not limited to, the rights of this subpart. The license holder must ensure that the rights to items A to R are protected:

...

B. right to a reasonable degree of privacy:

...

D. right to positive and proactive adult guidance, support, and supervision.

...

PORT GROUP HOME POLICIES

Resident Rights, Policy No. 10.4

POLICY

All residents and families of residents at PORT have rights, which will be respected at all times. All residents will be given a copy of these rights in the resident handbook. Residents' families will be given copies of the resident rights in the family handbook. A copy of these rights will be posited by the counselor's desk in each facility. In addition, a copy of the resident's rights must be posed in an area of the facility where it can be readily seen by the staff and the resident.

POLICY

A resident has basic rights including but not limited to the rights listed below:

All residents have the right to:

...

A reasonable right to privacy

...

To positive and proactive adult guidance, support and supervision.

PORT GROUP HOME ETHICAL STANDARDS

8.6 Respect for Residents

PORT employees will treat residents with respect and dignity at all times.

ARBITRATOR'S OPINION

The Employer raises a threshold issue: Is this matter properly before the arbitrator? They contend the case should be dismissed because of the Union's failure to file a written demand for arbitration as required by Article VIII, Sec. 8.1, Step 5 in the CBA grievance procedure.¹⁸ I think not. As noted in the factual background above, the Employer sent an email to the Union representative immediately following denial of the Step 3 appeal. Executive Director Kelm stated:

"PORT Group Homes would like to waive the non-binding mediation procedure and move directly to Step 5."

In my view, the Employer' statement constitutes a waiver of the CBA 14 day time limit for demanding arbitration.¹⁹ It would be manifestly unjust and an elevation of form over substance to dismiss this grievance under these facts. The Employer clearly expressed its desire to proceed to arbitration. The Union

¹⁸ Employer Exhibit 1, p. 8.

¹⁹ See Elkouri & Elkouri, *How Arbitration Works*, Seventh Edition 9 (2012), Chapter 5.7.A.iv.

justifiably believed the Employer had agreed to arbitration. The obvious purpose of a written notification is to alert the Employer. In this case, the Employer clearly knew arbitration was in the offing and cannot reasonably claim surprise. Had the Employer remained silent and had the Union then failed to file within the 14 day time limit, a different result would be warranted. However, under the facts before me, I find the grievance to be properly before me and ripe for determination.

As in all discipline cases, the Employer has the burden of proof. While there is a wide range of arbitral opinion on the nature of that burden, I agree with those who hold it to be "a preponderance of the evidence."²⁰

A review of discipline for alleged employee misconduct requires an analysis of several factors. First, has the Employer relied on a reasonable rule or policy as the basis for the disciplinary action? Second, was there prior notice to the employee - express or implied - of the relevant rule or policy, and a warning about potential discipline? A third factor is whether the disciplinary investigation was thoroughly conducted and whether or not the employee was given due process and the

²⁰ *The Common Law of the Workplace*, National Academy of Arbitrators, Second Edition (2005), §1.93.

right to rebut allegations. Fourth, did the employee engage in the actual misconduct as charged by the Employer?

Has the Employer relied on a reasonable rule or policy as the basis for terminating Grievant? The short answer is "Yes." First, the Union does not contest the reasonableness of the policies at issue. Respect for residents' privacy and dignity is an elemental right embodied in both Minnesota Rules and the Employer's policies. Doing otherwise would be counterproductive when dealing with at-risk teenagers.

Was the Grievant aware of the relevant rule or policies? I did not find Grievant's assertion of minimal training and confusion about rules credible. Despite her claim of never having seen a list of resident's rights, she signed a document acknowledging having read the Employer's Resident Rights policy when first employed.²¹ Further, testimony revealed that a listing of residents' rights is posted in every room in the home. In a six-month Performance Appraisal, Grievant's attention was specifically drawn to maintaining client confidentiality.²² Last, she was specifically warned about maintaining client privacy/confidentiality at the February 3, 2015 staff meeting and again by McKee in a later conversation.

²¹ Employer Exhibit 14.

²² Employer Exhibit 9.

Was the investigation thorough and was Grievant given due process? Again, the short answer is "Yes." The investigatory process, albeit short, was sufficient. Only two people were present at the incident leading to termination, Grievant and FR. Both were interviewed by the Employer. Grievant was allowed to present her version of the incident. That fully satisfies due process.

Did Grievant actually engage in the misconduct alleged by the Employer? I find that she did. When interviewed, her, *"...explanation of events was inconsistent and included backtracking on many details including where and when certain conversations took place."*²³ Although Grievant first denied asking FR about the pending adoption, she acknowledged, both in Step 3 and at the hearing of telling FR, *"If Sunny knows, why can't I. That's not fair."* Grievant asserts this was asked in a jocular manner. She either ignores or fails to realize the manipulative affect such a statement would have on a 13 year old, at-risk child. It implies that Grievant is enduring an injustice that only the child can remedy. It takes advantage of the naiveté and emotional immaturity of a 13 year old child and falsely induces her to reveal confidential information for no apparent reason other than morbid curiosity. Last, it

²³ Employer Exhibit 10.

unscrupulously plays on the child's trust in an adult counsellor. I find Grievant's immediate reporting of FR's revelations to be immaterial. It does not inoculate her from the consequences of disrespecting and invading FR's privacy - an invasion Grievant was specifically directed to avoid. I find Grievant committed the actions leading her discharge.

The Union argues that staff reports of FR's statement are hearsay and, as such, cannot be admitted or given credence. The Union is technically correct, however, by tradition hearsay evidence is admissible in arbitrations, but subject to weight.²⁴ In this case the staff members reporting FR's statements were subject to cross-examination. The most credentialed staff member, Allison Quincer, testified unreservedly that she believed FR to be telling the truth. Last, Grievant acknowledged and corroborated the most damning evidence against her - *"If Sunny knows, why can't I. That's not fair."* Consequently, I find the staff testimony credible and worthy of being accorded great weight.

Was termination the appropriate punishment under the facts of this case? Once again, the short answer is "Yes." While an arbitrator has the power to determine whether or not an employee's conduct warrants discipline, his discretion to

²⁴ *The Common Law of the Workplace*, National Academy of Arbitrators, Second Edition (2005), §1.57.

substitute his or her own judgment regarding the appropriate penalty from management's is not unlimited. Rather, if an arbitrator is persuaded the penalty imposed was within the bounds of reasonableness, he or she should not impose a lesser penalty. This is true even if the arbitrator would likely have imposed a different penalty in the first instance. On the other hand, if an arbitrator is persuaded the punishment imposed by management is beyond the bounds of reasonableness, he or she must conclude that the employer exceeded its managerial prerogatives and impose a reduced penalty. In reviewing the discipline imposed on an employee, an arbitrator must consider and weigh all relevant factors.

Although Grievant had worked for the Employer for less than 18 months, she had received coaching on three occasions,²⁵ one verbal warning,²⁶ and one written warning.²⁷ While the warnings are relevant, they were relatively minor - one for being tardy when picking students up from school and the other for bringing gifts for students in violation of Port policy. While Grievant

²⁵ Employer Exhibits 4, 7, and 9. Contrary to the Employer's assertion, I am unaware of any arbitration principle or decision that regards "coaching" as a form of discipline. While they might be relevant as evidence of an employee's knowledge or training, they are not a disciplinary step. As a consequence, they play no part in my analysis or decision in this grievance.

²⁶ Employer Exhibit 5.

²⁷ Employer Exhibit 6.

disputed the latter at the hearing, she agreed with the discipline at the time and did not grieve it.

Normally, her somewhat checkered record would not lead to a termination were this, too, a minor infraction. However, in this case, Grievant's conduct undermines the very purpose of the group home - respecting, protecting and, hopefully, elevating the prospects of at-risk children. Although it appears no one was ultimately hurt by her actions, Grievant's manipulation of an immature, emotionally unstable, at-risk child has no place in a group home environment. I see no reason to second guess the Employer's decision to terminate Grievant.

AWARD

The grievance is DENIED.

Dated: September 27, 2016

Richard A. Beens, Arbitrator